

***United States Court of Appeals
for the Second Circuit***



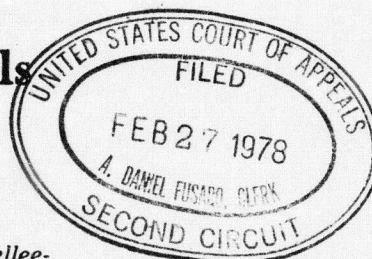
APPELLEE'S BRIEF

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77-6167

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**United States Court of Appeals
For the Second Circuit**



ROBERT A. LENNON,

*Plaintiff-Appellee-
Cross-Appellant,*

-against-

UNITED STATES OF AMERICA,

*Defendant-Appellant-
Cross-Appellee.*

*On Appeal From The United States District Court
For The Eastern District Of New York*

BRIEF FOR THE APPELLEE-CROSS APPELLANT

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-6167

ROBERT A. LENNON,

Plaintiff-Appellee-
Cross-Appellant,

--against--

UNITED STATES OF AMERICA,

Defendant-Appellant-
Cross-Appellee.

BRIEF FOR THE PLAINTIFF-APPELLEE-CROSS-APPELLANT

THE ISSUE PRESENTED ON APPEAL

Was the \$600,000 award by the court below appropriate, inadequate or excessive to compensate the 26 year old plaintiff for the loss of his right leg and its continuing complications, for a lifetime of pain, suffering and disability, and for diminution and loss of his lifetime earning capacity?

PRELIMINARY STATEMENT

This is an appeal by the United States of America

from a \$600,000 judgment granted to the plaintiff in the United States District Court for the Eastern District of New York (Mark A. Costantino, Judge) on August 11, 1977 following a non-jury trial held on various dates between March 7th and April 4th, 1977.

Findings of fact and conclusions of law were made by the trial court on August 10 and November 8, 1977, finding medical malpractice and liability by the government.

Upon this appeal the appellant does not contest its liability to plaintiff. It appeals solely on the ground that the award for damages was excessive.

The plaintiff cross-appeals on the ground that the award was inadequate and that the court below improperly failed to consider and include plaintiff's loss of earnings and loss of his future earning capacity in fixing the amount of the award.

STATEMENT OF FACTS

A. THE INJURY, PAIN, SUFFERING AND DISABILITY

On June 9, 1972, plaintiff, a 21 year old veteran of the Vietnam War, sustained a fracture of his right leg in a motorcycle accident in New York City (A12). Within hours after the occurrence he was transferred to St. Albans Naval Hospital where his wound was debrided, the fracture was set

and a Lottes nail inserted. He remained in the hospital as an in-patient until December 29, 1972 except for a short period of time from October 24th to November 11th, 1972.

The proof established that, while plaintiff was a patient at St. Albans Hospital, he was neglected and treated improperly, that bacterial cultures were not taken promptly and properly, that antibiotic treatment was delayed, that improper and inadequate antibiotics were administered, that infection and osteomyelitis was thereby caused and permitted to develop and spread. Further improper treatment after the onset of the infection included defendant's physician improperly drilling through bleeding bone and improper skin grafts.

The osteomyelitis spread, worsened in intensity and became chronic in nature (A-12, 13). This resulted in amputation of the right leg below the knee on October 29, 1974. The stump never has closed or healed properly (A-14).

The court below concluded that the defendant was negligent, that its negligence resulted in the bone infection spreading and becoming irreversible and unresponsive to care and necessitated the amputation. Had the plaintiff been rendered proper treatment at the outset, the infection

would have been cured and the plaintiff would have had an excellent chance of making a full recovery from his initial injury (A14-15).

The plaintiff testified and the court found that prior to the occurrence the plaintiff was a normally active young man who engaged in rigorous physical activity. He played baseball, football and basketball. He enjoyed dancing, camping and hunting (A19, 35, 36, 55). He cannot participate in any of these activities any longer (A151). Since the amputation he has had virtually no social life (A36, 55, 147, 148).

Plaintiff's pain and suffering must be judged in the context of separate operative procedures necessitated by the infections caused by defendant's negligence before the amputation became inevitable (A98).

Since the amputation the plaintiff has suffered from constant pain at the stump site and phantom pain. This pain is real, not imaginary, and it is permanent (A300-301). The phantom pain sensations are derived from severed nerves leading to the missing amputated leg and foot. He suffers from pins and needles sensations and itching in the missing foot which cannot be alleviated. He has sensations of

electric shock-like pain in the amputation stump (A109).

Plaintiff is unable to sleep through the night because he is awakened by the phantom pains, or if his stump bumps against his left leg (A-128). When he is awakened he must get out of bed and soak his stump in an attempt to relieve the pain and itching (A-110, 111). His stump never has healed and is constantly draining (A-116, 119, 132). The phantom pains will persist for the rest of the plaintiff's life (A-300-301).

Plaintiff is unable to wear any prosthesis for extended periods of time because bearing his weight on it causes the stump to tear open and drain (A-124-126). As a result, he must remove the prosthesis for prolonged periods to allow the wound to close (A-292). Thereafter, the cycle always repeats itself, for after a few weeks of wearing the prosthesis the stump opens and drains again (A-292).

When the stump is draining he must wrap it in bandages every night and can get about only with the use of crutches (A-129-130).

At home, when he cannot wear his prosthesis to get about, he is forced to crawl on his hands and knees or slide along the floor (A-152-153).

The severity and permanency of the plaintiff's injuries was confirmed by the testimony of Dr. Leo Koven, a Diplomate of the American Board of Orthopedic Surgery. For the past 14 years he has been Chief of the Department of Orthopedic Surgery at Jewish Hospital in Brooklyn, and Chief of the Department of Orthopedic Surgery at Long Island College Hospital in Brooklyn. He also is on the faculty of the State University of New York at Downstate Medical Center in Brooklyn and is an impartial medical consultant for the State of New York (A-235-237).

Dr. Koven testified that the plaintiff's condition never has healed and that the constant breakdown and drainage of the stump is caused by the extensive bacterial involvement which never has been cleared up. This condition is known as cellulitis and is a permanent condition which cannot be treated by medication alone (A-293).

Under the pressure of weight-bearing upon the prosthesis which is unavoidable, his wound chronically breaks down at the site of the amputation scar (A-292).

Surgery could be attempted to clear this condition by a revision of the amputation and by shortening the remaining portion of his right limb and removal of bone and

soft tissue (A-293, 294). However, at best there would be only a 50% chance of success if the surgery were performed, because of the length of time that the infection has been present and the plaintiff's history of a number of episodes of recurrent infection (A-293, 294, 682-684). In any event, the revision surgery would be highly hazardous (A-684).

Even if the plaintiff should undergo surgery for a stump revision and removal of the cellulitis condition, he is still subject to recurrences. And if reinfection should occur after a revision, then plaintiff would have to undergo reamputation of his right limb above the knee, which is more disabling functionally than an amputation below the knee (A-294-295).

During Dr. Koven's testimony the plaintiff's stump was exhibited to the court. The area of the stump was demonstrated to be red, crusted and indented (A-296). There was evidence of drainage visible on the stump. Dr. Koven had seen the stump drain on prior occasions (A-299). When the stump is draining, the plaintiff is totally disabled for practically everything (A-300).

The plaintiff is totally disabled from doing the things that a two legged person can do. He is occupationally un-

employable in any field which requires travel, standing or walking (A-679).

In summary: the testimony of Dr. Koven established that the plaintiff's amputation is complicated by a chronic, permanent condition of cellulitis which causes repeated breakdowns and drainage of the stump; that any attempted surgery to alleviate the condition will be highly hazardous with doubtful chances of improvement.

B. THE LOSS OF EARNING CAPACITY AND EARNINGS

The court below, in awarding damages, stated:

"The evidence introduced to establish plaintiff's loss of earnings was speculative at best. While plaintiff has proved that the range of jobs available to him is reduced, he has not proved that his residual earning capacity has been diminished".

In the light of the proof adduced by plaintiff, it is submitted that this finding of fact is clearly erroneous.

Dr. Koven testified that the plaintiff is unemployable and totally disabled in any field of endeavor which requires even minimal travel, standing, walking or weight-bearing (A-679).

Just before his hospitalization, plaintiff was well on the way to fulfilling his ambition to become a union electrician. He became interested in electricity at the age of

17. He sought and received informal instruction and books about electricity and did electrical work then and thereafter (A-40-42). In 1968 and 1969 he worked for Rothbel Electricians as a general electrical helper (A-43).

Richard Farrell, who testified on behalf of the plaintiff, is vice-president of MEBCO Industries, an electrical contracting company. He was the plaintiff's superior and foreman at Rothbel Electricians when plaintiff worked there in 1968 and 1969 (A-349) until he enlisted for military service with the United States Marines (A-351). Plaintiff worked with electricity, including "pulling wire", making permanent electrical connections and as a general electrician's helper (A-351, 352).

Mr. Farrell testified that the plaintiff had "fantastic potential". He would always ask questions and read books concerning electricity (A-352-353). He studied and was always dependable (A-353).

When the plaintiff became a U. S. marine, he was told by Mr. Farrell and Mr. Rothbel, the owner of the company, that there would be a job waiting for him when he returned from military service (A-353).

After his discharge from the Marines plaintiff

commenced a business of general contracting work, including electrical work, and soon was earning approximately \$150 a week. His work required a great deal of physical activity such as bending, stooping, lifting and climbing ladders (A-50-53). He also worked for Jacobson Builders in 1974 prior to his amputation, doing boiler maintenance work, which included electrical work (A-98, 99). After his amputation he made repeated efforts to work at various jobs but had to give them up because of his disability when his stump would open up and drain. Thus, he tried working at a gas station but this lasted only 6 days (A-137, 138). He tried a sitting job with a car service but this lasted only 4 days because his stump again opened up (A-139, 140). He applied for a job with the telephone company which would not hire him because of his condition (A-142). He registered with the New York State Unemployment Service and other employment agencies, all without success (A-143-144).

When Mr. Farrell learned that plaintiff had lost his leg, he gave him a job as a dispatcher at MEBCO in 1976, where plaintiff worked for about 6 to 7 months (A-354). But plaintiff was unable to hold the job. His attendance was poor because of his problem with the amputation stump. He missed many days and hours from work. Although this was

basically a desk job, he was unable to perform it well and regularly, causing him to be discharged because of his disability (A-355-357).

Mr. Farrell testified that MEBCO Industries did a gross annual business of \$12,000,000 and that, but for his disability, he and MEBCO would have sponsored plaintiff for union membership in the electrical union apprenticeship program (A-358-361).

The union program is a five year apprenticeship program. If plaintiff had commenced to work in 1973 as an apprentice, his earnings during the five year apprenticeship period, from 1973 through 1977, would have amounted to the total sum of \$63,890 (A-364-372). Upon conclusion of the five year apprentice program, the plaintiff would have qualified to become a Journeyman A union electrical mechanic at a salary of \$34,110 a year, plus union benefits and additional overtime earnings (A-372). Historically, the salary for such Journeymen A mechanics has averaged a 9% annual increase.

Thus, even assuming that the plaintiff's salary had remained static without any increase until the age of 65, a period of 39 years, the projection of plaintiff's future loss of earnings would have amounted to approximately \$1,330,000

(A-420, 421).

Dr. Lawrence Ritter, a Professor of Economics and Finance at New York University testified as an expert concerning plaintiff's loss of earnings and earning capacity (A-391-395). He is Chairman of the Department of Finance at the Graduate School of Business at New York University and is author of numerous articles and treatises. In an erudite presentation he traced the course of our economy and its inflationary spiral. The inflation rate of wages and prices in 1974 was 11% to 12%; in 1975 it was 9% to 10%; in 1976 it was 4.9% to 5.5%. In the past 3 years the average increase was 8% (A-384, 385).

Based upon the earnings schedule for Journeymen A electrician mechanics, as testified by Richard Farrell, Dr. Ritter testified that plaintiff's loss of earnings, without taking into consideration yearly raises, based on an annual salary of \$34,110, the plaintiff's loss of future earnings would amount to the total sum of approximately \$1,330,000 (A-421). If that sum were discounted to present value at an annual rate of 6%, it would amount to approximately \$509,000 (A-410). If added to this were \$63,890 in loss of earnings from 1973 to 1977, the total present value would amount to approximately \$573,000 (A-410). But Dr. Ritter

calculated that this sum would depreciate in value by reason of the inflationary spiral. Dr. Ritter testified: "It is quite within the realm of probability that it could be between 8% and 12% " (A-413). He testified that an allowance of only an average 6%, an optimistically low, conservative inflation rate, would make the total actual future earnings loss \$1,330,000.

Thus, the inflationary spiral and the present value discount concept, each based on a 6% annual factor, offset each other, leaving plaintiff's true loss of future earnings at the \$1,330,000 figure (A-415).

To ignore these fair and reasonable calculations is to deprive plaintiff of his just recompense for this category of his damages.

Thus, on the basis of the testimony of Dr. Ritter and Mr. Farrell who was familiar with the plaintiff's pre-injury working ability, the proof established that plaintiff had sustained a huge diminution or destruction of his future earning capacity. Indeed, he lacked the ability to attend regularly to perform a low-paying desk job.

It is undisputed that plaintiff is unemployable and, to the time of trial had lost some \$63,000. It is beyond dispute that his future earning capacity has been substantially

destroyed.

Thus, the District Court's finding of fact that plaintiff's evidence concerning loss of earnings "was speculative at best" is clearly erroneous. The proof was clear and explicit on past earning losses and the loss of future earning capacity. It is submitted that the lower court's finding of fact in this regard was error resulting in an inadequate award to the plaintiff.

P O I N T I

THE AWARD OF \$600,000 WAS INADEQUATE IN
VIEW OF THE COURT'S ERROR IN FAILING TO
CONSIDER LOSS OF EARNINGS AND DIMINISHED
FUTURE EARNING CAPACITY.

The rejection by the court below of plaintiff's loss of earnings and diminished earning capacity was totally inconsistent with the uncontradicted proof which established that, but for the negligence of the defendant, the plaintiff would have been able to join a five year union apprenticeship program in 1973, leading to the status of Journeyman A electrician mechanic. His loss of earnings for the five year apprenticeship program alone amounted to \$63,890.

The minimum union scale prevalent for 1977 for a Journeyman A mechanic was \$34,110. Without consideration of overtime or future yearly pay increments, this would have

amounted to earnings to the age of 65 in excess of \$1,330,000, all of which is no longer available to the plaintiff because of the loss of his leg. To rule out totally all past lost earnings and future lost earning capacity is utterly unwarranted, particularly in light of the proof of plaintiff's ambition to be an electrician since he was 17 years of age and the various jobs he obtained before he was injured.

The uncontradicted testimony of Mr. Farrell established unequivocally that plaintiff would have been hired by Mr. Farrell and placed in a union apprenticeship program. Nor was this a speculative career goal on the part of the plaintiff. By dint of ambition, study and work, he already had acquired skill in his chosen craft as an electrician.

The plaintiff's amputation and ghastly condition of cellulitis renders him almost totally unemployable. Despite the fact that he has sought work and attempted to work for the past four years, he has been unable to obtain or hold any meaningful employment.

It is academic that one who is injured may recover damages based upon the impairment of future earning capacity. Cunningham v. Rederiet Vendeggan, A/S 333 F.2d 308 (2nd Cir.);

Grayson v. Irvmar Realty Corp., 7 A.D.2d 436 (1st Dept., 1959).

Even aside from the abundant proof of lost past and future earnings and earning capacity, this court should take judicial notice that a person of the plaintiff's demonstrated ambition and work background in a special field of expertise has sustained a huge loss of future earning capacity as a result of the loss of his leg.

In Fruit v. Schreiner, 502 P.2d 133 (1972), a verdict of \$635,000 in favor of a 64 year old carpenter was held not excessive where the plaintiff, as a result of being struck by an automobile, had one leg amputated and lost some muscle tissue of the other leg. He had a life expectancy of 13.5 years.

In the case at bar the plaintiff, now only 26 years old, has a life expectancy of approximately 45 years and had a demonstrated minimal potential of earning \$1,330,000 to the age of 65. Surely, the award of \$600,000 for pain, suffering and disability, while rejecting consideration of his diminished earning capacity, is unrealistic and illogical.

Similarly, in Carreras v. Honeggers & Co., 244 N.W.2d 10, (1976), the plaintiff, a truck driver in his forties,

lost his left leg above the knee. A verdict of \$500,000 was sustained as not excessive.

In DeSantis v. Parker Feeders, Inc., 547 F.2d 357 (1976), a verdict of \$840,000 for a six year old boy who had lost one leg and some toes of his other leg, was affirmed as not excessive. Unlike the case at bar, any evidence in DeSantis on loss of future earning capacity would have been speculative since the six year old plaintiff was too young to have a demonstrated earning capacity or vocational experience background. In sharp contrast with DeSantis, plaintiff in the case at bar proved he already had attained a considerable work experience background and excellent prospects for attaining the status of a union electrician within five years.

Recently in Bishop v. Metropolitan Transportation Authority 400 N.Y.S.2d 2, ___ A.D.2d ___ (1st Dept. 1977), decided December 6, 1977, a jury verdict of \$1,500,000 was reduced to \$750,000 by the appellate court and, as modified, was affirmed. The plaintiff in Bishop was a 23 year old housewife who earned approximately \$4,000 a year and sustained the loss of her foot, among other less serious injuries, as a result of a motor vehicle collision. Surely, by comparison with Bishop, an award of \$600,000 for the 26 year old plain-

tiff Lennon, with a demonstrated lifetime earning potential in excess of \$1,000,000 is inadequate.

In Ventricelli v. Kinney Rent-A-Car Corporation, 399 N.Y.S.2d 237, __A.D.2__ (1st Dept., 1977), the 43 year old plaintiff sustained an amputation of his leg after an automobile accident. He was single and earning \$7,280 a year. A verdict of \$550,000 was not held to be excessive but was reversed on other grounds. By comparison, the greater life expectancy and greater earning potential of the plaintiff in the case at bar certainly justified a substantially higher verdict than that in Ventricelli.

In Lovaglio v. Chen, (Supreme Court, Kings County, 1977) (unreported), a jury verdict of \$1,250,000 was rendered in favor of a 2½ year old girl in a medical malpractice action for the loss of her leg. During the appeal process the case was settled for \$750,000. By comparison, the plaintiff in the case at bar certainly merited a larger recovery than the plaintiff in Lovaglio, supra, by virtue of plaintiff Lennon's undiminished, continuous pain, suffering, cellulitis, draining stump, inability to bear weight or be fitted with a usable prosthesis, and his huge loss of future earnings.

Truly, the case at bar is unique in the youthfulness of plaintiff's age, his pain, suffering, disability and his

extraordinarily high future earning capacity exceeding \$1,300,000.

The appellant's argument that this award was excessive and unreasonable is utterly without merit in view of the horrendous injuries and the other voluminous proof in the record which, to the contrary, shows it to be grossly inadequate. The plaintiff faces a lifetime of continuing reinfection, recurring drainage from his stump, additional surgery, and additional loss of bone and tissue. His life is blighted and warped by the effects of his injury.

To date plaintiff has undergone five years of indescribable physical and mental pain, humiliation, pain, anguish and suffering. He must live with his disabled, deformed body and the knowledge that he never can attain his vocational goals as an electrician and Journeyman A mechanic, a goal which he sought and labored to achieve since the age of 17. He has a life expectancy of 45.1 years. Adding this to the five years which elapsed since the acts of malpractice inflicted pain and suffering upon him, a half century of agony and deprivation has been thrust upon him

An adequate award should consist of a total sum comprising:

(a) \$600,000 for pain, suffering, disability, future

medical and surgical expenses and the lost enjoyment of a normal life and happiness; the likely and almost certain loss of matrimonial prospects, and a host of other deprivations.

(b) Loss of past earnings reasonably amounting to \$63,000 since 1973 when proper care, according to Dr. Koven, likely would have restored plaintiff to full recovery and employment capacity (A-291, 292).

(c) Loss of future earning capacity reasonably amounting to \$1,330,000 without overtime or salary increases as a Journeyman A mechanic electrician.

The total sum of these damage categories amounts to the sum of \$1,993,000. It is respectfully submitted that each of the foregoing damage categories are computed reasonably and conservatively upon the basis of the proof in the record.

CONCLUSION

THE AWARD TO THE PLAINTIFF SHOULD BE INCREASED TO THE SUM OF \$1,993,000.

Respectfully submitted,

Joseph Kelner
Attorney for Plaintiff

James Deutsch
Gilbert S. Glotzer
On the brief

~~GREENBERG~~ *Ke/na*

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 27 day of Feb., 1978 ~~1977~~ deponent served the within *BR/EX* upon

U.S. Attorney, Eastern Dist. of NY

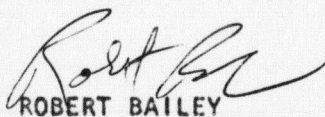
attorney(s) for

Appellee

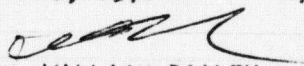
In this action, at

225 Cadman Plaza East., Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies (same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 27 day
of Feb., 1978, ~~1977~~



WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978